No. 14100.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

WILSHIRE HOLDING CORPORATION,

Respondent.

Petition for Rehearing by Respondent and Request for Hearing En Banc.

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FILED
JAN - 3 1957
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The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Statement of Case.

Your petitioner, Wilshire Holding Corporation, is the respondent in the above entitled action.

Heretofore the Tax Court of the United States in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue* ruled in favor of the Commissioner of Internal Revenue, and in the companion case of *Wilshire Holding Corporation v. Commissioner of Internal Revenue* ruled in favor of Wilshire Holding Corporation.

That thereafter *Walburga Oesterreich* appealed the decision of the Tax Court to the above entitled Court in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue,* No. 13924; and the Commissioner of Internal Revenue took a protective appeal in the case of *Commissioner of Internal Revenue v. Wilshire Holding Corporation,* No. 14100.

Pursuant to a stipulation of the parties, proceedings on appeal in the above entitled case No. 14100 were held in abeyance pending the decision of the Court in the *Oesterreich* case, No. 13924.

Wilshire Holding Corporation was permitted to file a brief *amicus curiae* in the *Oesterreich* case and was permitted to argue at the time of oral argument in the *Oesterreich* case.

The above entitled Court reversed the Tax Court in the *Oesterreich* case on October 29, 1955.

Wilshire Holding Corporation on November 6, 1955 asked the Attorney General to file a petition for rehearing in the *Oesterreich* case and on November 10, 1955 the Attorney General informed your petitioner that it would not do so.

That thereupon, on November 23, 1955, Wilshire Holding Corporation petitioned the above entitled Court for an order permitting it to file a petition for rehearing in the *Oesterreich* case as *amicus curiae,* and submitted the proposed petition therewith.

That the above entitled Court on June 6, 1956 denied the said petition of Wilshire Holding Corporation to file a petition for rehearing as *amicus curiae* in the *Oesterreich* case.

That the Commissioner of Internal Revenue after the decision in the *Oesterreich* case made a motion that the decision of the Tax Court in the above entitled case be summarily reversed on the basis of the Court's opinion in the *Oesterreich* case.

Wilshire Holding Corporation filed its written objections to the motion to reverse and thereafter, without

a hearing or affording an opportunity to Wilshire Holding Corporation to submit oral argument, the above entitled Court on December 6, 1956 made an order granting the motion to summarily reverse the Tax Court in the above entitled action.

Grounds for Rehearing.

A rehearing should be granted herein and the decision vacated for

I.

THE DECISION WAS RENDERED CONTRARY TO THE COURT'S RULES.

II.

THE DECISION IS CONTRARY TO LAW.

A. WHERE THERE IS A LEASE WITH A RIGHT TO PURCHASE, THE RENTAL PAYMENTS ARE NOT CONSIDERED AS PURCHASE PRICE PAYMENTS UNTIL THE PURCHASE RIGHT IS EXERCISED OR EXERCISABLE, OR UNTIL IT MAY BE PREDICTED WITH CERTAINTY THAT THE RIGHT WILL BE EXERCISED.

B. A REVIEW IS LIMITED TO QUESTIONS OF LAW.

III.

THE DECISION IS CONTRARY TO THE EVIDENCE.

A. THE REAL INTENT OF THE PARTIES WAS TO EFFECT A LEASE RATHER THAN A SALE.

B. THERE WAS A VALUABLE CONSIDERATION FOR THE FUTURE TRANSFER OF TITLE OTHER THAN THE MONTHLY PAYMENTS.

C. WILSHIRE HOLDING CORPORATION HAS NOT ACQUIRED AN EQUITY IN THE PROPERTY.

D. THE PAYMENTS BY WILSHIRE HOLDING CORPORATION ARE COMMENSURATE WITH THE BENEFITS DERIVED BY IT.

ARGUMENT

POINTS AND AUTHORITIES.

(Unless otherwise stated, reference to pages is to the Transcript of Record; Stip. refers to Stipulation; par. refers to Paragraph; Dep. refers to Deposition of W. Frank Moulton, and Ex. refers to Exhibit.)

I.

The Decision Was Rendered Contrary to the Court's Rules.

Rule 15, Subdivision 2, provides: "One-half hour on each side shall be allowed to the argument of a motion. . . ."

In this case the motion of the Commissioner of Internal Revenue summarily to reverse was dated November 8, 1955, and the Court granted the motion on December 6, 1956, more than a year later, without setting the motion on the calendar for argument and without granting Wilshire Holding Corporation the one-half hour for argument as provided in Rule 15.

Rule 23 provides: "A petition for rehearing may be presented within thirty days after judgment. . . ." In the *Oesterrreich* case the Attorney General refused to file a petition for rehearing, and the Court denied leave to Wilshire to file a petition for rehearing as *amicus curiae*.

It is obvious that the spirit, if not the letter, of the Court's own rules was violated by the Court when it summarily granted the motion of the Commissioner of Internal Revenue summarily to reverse the decision of the Tax Court.

Counsel respectfully urge that the Court is in error when it states in its opinion summarily reversing the Tax

Court that "the Wilshire Holding Company had its day in Court." The Court is also in error when it states in its opinion that the Wilshire Holding Company "was permitted to use the full time assigned to the respondent for oral argument" in the *Oesterreich* case. While it is true that counsel for Wilshire did argue at the time of oral argument, the Attorney General's office representing the Commissioner of Internal Revenue also presented oral argument.

It is manifestly clear that Wilshire did not have its full day in Court, and it is also manifestly clear that the decision summarily to reverse the Tax Court did not give Wilshire full consideration on its merits, in view of the failure to permit oral argument by Wilshire in connection with the motion to reverse, and in failing to permit Wilshire to file a petition for rehearing in the *Oesterreich* case when the Attorney General refused to do so.

Since it appears that the Court was going to decide the Wilshire case on the basis of the *Oesterreich* case, it should have afforded every opportunity to Wilshire fully to present its position. This the Court did not do when it would not allow Wilshire to file a petition for rehearing. Furthermore, Wilshire did not have its full day in Court when it was not afforded the opportunity orally to argue the motion to reverse, for as stated in the written objections to the motion to reverse, the decision in the *Oesterreich* case was not necessarily controlling. Wilshire was and still is prepared to submit to the Court the contention that if any of its payments to Oesterreich are to be capitalized instead of deducted as a business expense, that such capitalization should not occur until the "purchase price" of the property is reached,

or in the alternative, if the "purchase price" of the property is to be capitalized from the first payments made to Oesterreich, that Wilshire should be entitled to deduct as a business expense the excess payments of the appraised value of the property as rental or interest payments.

These contentions are only properly presentable in the appeal taken by the Commissioner of Internal Revenue against Wilshire. They could not properly have been presented by Wilshire in the *Oesterreich* case because the question of capitalization of payments made by Wilshire is a matter that applies only to Wilshire. In short, the issue of capitalization of payments is something that can be applied only to Wilshire and not to Oesterreich, since the payments were being made by Wilshire and not by Oesterreich.

It is clear that the Court in reversing the Tax Court in the *Oesterreich* case in effect rewrote the agreement between Oesterreich and Wilshire. An instrument which everyone concerned for more than twenty years considered to be a lease was rewritten by the Court's decision so as to make it a contract of sale. As long as the Court was rewriting the agreement by its decision, surely it should have considered the question of capitalization of reasonable payments. To do otherwise reduces the situation to an absurdity. Stated briefly, the decision of the Court was that Wilshire shall pay as a capital investment $679,000.00 for a piece of property which was considered to be worth only $50,000.00, or at the most $75,000.00 at the time the lease was drawn in 1929.

For the foregoing reasons, the decision summarily reversing the Tax Court was reached contrary to the Court's own rules, to-wit, Rules 15 and 23.

II.

The Decision Is Contrary to Law.

A. Where There Is a Lease With a Right to Purchase, the Rental Payments Are Not Considered as Purchase Price Payments Until the Purchase Right Is Exercised or Exercisable, or Until It May Be Predicted With Certainty That the Right Will Be Exercised.

The Court in its decision has overlooked the authorities cited by Wilshire in its brief as *amicus curiae* in the *Oesterreich* case, wherein the courts considered the payments to be rent in similar cases.

Edward E. Haverstick, 13 B. T. A. 837;

Indian Creek Coal and Coke Company, 23 B. T. A. 950;

Rotorite Corporation v. Commissioner, 117 F. 2d 245;

Foellinger v. Smith, 29 A. F. T. R. 1416.

In a recent case, *Breece Veneer and Panel Company v. Commissioner of Internal Revenue,* 232 F. 2d 319, decided April 26, 1956 (subsequent to the decision in the *Oesterreich* case), the United States Court of Appeals for the Seventh Circuit ruled that payments made under a "lease and option to purchase" agreement constituted deductible rental expense.

In the *Breece Veneer and Panel Company* case the taxpayer entered into a "lease and option to purchase" agreement with the R. F. C. in 1943 with respect to certain property. Taxpayer was to pay $100,000 in 60 monthly installments as "rent," after which it had the option to purchase the property for $50,000. The taxpayer claimed the monthly payments as deductible rental

expense under Sec. 23(a)(1)(A), 1939 Code, but the Tax Court disallowed the claimed deductions on the ground that the taxpayer was acquiring, through the monthly payments, an equity in the property, and the evidence indicated the R. F. C. would not have sold the property for $50,000, or any comparable amount. The property in question had a fair market value at the time of the agreement of $376,500 and was insured for $325,000. The evidence also showed that the R. F. C. was primarily interested in selling the property and for reasons of its own, was willing to sell for a price of $150,000 to $185,000.

The Court of Appeals reversed. The taxpayer was neither bound to pay rent substantially equal to the value of the property to obtain a deed, nor was it sure to become the owner. The amount of the rent after five years lacked the substantial sum of $50,000 to make the taxpayer the owner. The Tax Court in applying the economic test erroneously considered the contract in retrospect. (*Benton* (C. A. 5), 197 F. 2d 745.) It was immaterial that the property proved to be a bargain to the taxpayer. The R. F. C. probably would not have sold the property for $50,000 in 1943 but a large decline in the value could reasonably be expected by 1948. The plant was not modern and the equipment was old. However, the *Benton* case held that the economic test in itself is only one of the factors to be considered to determine the intention of the parties. The evidence relating to 1943 negates the intention of building up an equity. The taxpayer rented the whole of the premises, instead of 30% as it formerly did for $700 per month. There was evidence that the fair gross rental value of the entire premises was $45,000 per year. Taxpayer was threatened

by a possible lease of the entire property to another tenant, and it could reasonably anticipate a considerable reduction of its rent by a sublease of part of the premises to the other tenant.

The taxpayer in a 1941 letter to the R. F. C. had offered to buy its portion of the premises on a contract for deed for $100,000 with a down payment of $6,000 and later suggested a lease with the rent to apply on the purchase price. The intention of the parties cannot be determined unilaterally. The R. F. C. evidently did not agree with the taxpayer as to the terms of the contract and consummated the transaction in the form of a lease drawn by the R. F. C. with a sublease to the other tenant. The R. F. C. was attempting to protect itself in the transaction by a lease. In case of default in rent it would be easier to regain possession from a tenant than to foreclose or forfeit a contract to purchase and dispossess the purchaser. The taxpayer could exercise the option or not, but in the meantime the payments were neither to be applied on the purchase price, nor were the monthly payments to be made by the taxpayer more than the reasonable rental value.

B. A Review Is Limited to Questions of Law.

The Court in its decision in the *Oesterreich* case overlooked the principle of law that an Appellate Court will not weigh testimony, and as long as there is ample evidence in the record to sustain the findings of the lower court it will not reverse those findings of fact.

The Tax Court found that Exhibit 1 was a lease, on the basis of the evidence, both written and oral. Since there is a reasonable basis for the Tax Court's decision,

the Appellate Court should uphold the decision of the trier of fact.

Corn Products v. Commissioner of Internal Revenue, 76 S. Ct. Rep. 20.

Tax Court's findings of fact is not to be set aside by court, even if upon examination of evidence court might draw a different inference.

Jurs v. C. I. R. (C. C. A. 9, 1945), 147 F. 2d 805.

The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should be given wide range in tax proceedings involving factual disputes.

C. I. R. v. Scottish American Inv. Co. (1944), 65 S. Ct. 169.

It is province of Tax Court to determine facts.

Rider v. C. I. R. (C. A. 8, 1952), 200 F. 2d 524.

Inferences of fact made by Tax Court in tax case will not be disturbed on appeal by Court of Appeals unless clearly erroneous.

Benton v. C. I. R. (C. A. Tex., 1952), 197 F. 2d 745.

Strict findings of fact by the Tax Court are beyond controversy on petition to review the Tax Court's decision in the Court of Appeals.

Three States Lumber Co. v. C. I. R. (C. C. A. 7, 1946), 158 F. 2d 61.

Determination of a question of fact by Tax Court, supported by competent evidence, is not open for determination in Court of Appeals.

Welsbach Engineering & Management Corporation v. C. I. R. (C. C. A. 3, 1944), 140 F. 2d 584, cert. den. 64 S. Ct. 1261.

Other cases to the same effect are:

Aviation Club of Utah v. Commissioner, 162 F. 2d 984;

Richards v. Commissioner, 81 F. 2d 369;

American Pacific Whaling Co. v. Commissioner, 100 F. 2d 46;

Woodall v. Commissioner, 105 F. 2d 474;

Blair v. Curran, 24 F. 2d 390.

III.

The Decision Is Contrary to the Evidence.

A. The Real Intent of the Parties Was to Effect a Lease Rather Than a Sale.

In reversing the decision of the Tax Court in the *Oesterreich* case the reviewing Court disregarded the *real* intent of the parties and jumped to an erroneous conclusion that the intent of the parties was to transfer title. The evidence was clear that the parties intended a lease, not because they called it a lease but because all of the indicia of a lease were present:

1. During all of the years from 1929 on, Wilshire entered all amounts paid to Oesterreich as rental expense and reported it as such. [Stip. par. 8, p. 35 and pp. 68-69.]

2. Oesterreich entered all amounts received from Wilshire from the year 1929 on as rental income upon her

books and reported said amounts as rental income on her income tax returns. [Stip. par. 9, p. 35; pp. 68, 126-127.]

3. Never did it occur to Oesterreich that the instrument was not a lease, but rather a sale, until a revenue agent so advised her. [P. 139.] The agent's findings were included in a report dated December 14, 1948. [Pp. 16-20.] The revenue agent was reversed by the office of the Internal Revenue Agent in Charge, and Oesterreich was so advised on July 26, 1949. [Pp. 21-24.]

4. In January of 1929 the late A. H. Chotiner and his son Albert Jack Chotiner, officers of the corporate predecessor of Wilshire, informed W. Frank Moulton that they proposed to construct a theatre, and sought a long term ground lease. [Dep. pp. 6, 11.]

5. Oesterreich owned three lots on Wilshire Boulevard at Hamilton in Beverly Hills and informed Moulton she was willing to enter into a long term lease, but did not want to sell the land. [Dep. pp. 11, 33.] The Chotiners informed Oesterreich they wished to lease her land. Oesterreich said she was willing to enter into a long term ground lease if suitable terms could be arranged. [Pp. 145, 148.]

6. Negotiations extended over a period of approximately nine months and culminated in the making of a lease dated September 11, 1929. [Stip. par. 3, p. 33; Dep. pp. 41, 61, 83.]

7. During the negotiations Oesterreich stated on several occasions she did not expect to be alive at the end of the term of the lease and was indifferent to the disposition of the fee at that time, but was interested in securing a substantial rental during her lifetime. [P. 154; Dep. pp. 24, 27, 50, 64.]

8. No offer to buy the land was ever made during the course of negotiations. [Pp. 134, 160, 165; Dep. pp. 23, 31.]

9. Although it was alleged that an option was requested to purchase the land, Oesterreich refused to grant or allow an option to purchase. [Pp. 137-138; Dep. p. 36.]

10. At no time during the course of negotiations did either of the parties discuss the sale of the land, and Oesterreich did not offer to sell the land. [P. 146; Dep. pp. 22, 24-25.]

11. The parties did not discuss the value of the land at any time during the negotiations. [Pp. 165-166; Dep. pp. 26-27.]

12. The execution of the lease was not preceded by an oral agreement to purchase. [Dep. p. 31.]

13. The tax consequences of the lease were not considered by any of the parties. [P. 140.]

14. At the time the lease was negotiated the land had a value of not less than $50,000.00 and not more than $75,000.00. [P. 74; Dep. pp. 18, 46.]

15. Moulton, the real estate agent, was paid a commission by Oesterreich for finding a tenant. [Dep. pp. 19-22, 56, 63.]

16. There is a difference between a sales commission and a rental commission. [Dep. p. 21.] The commission for a sale was a straight 5%. [Dep. p. 57.] Rental commission is based on the Realty Board Book. [Dep. p. 58.] The Realty Board Book provides for 3% of the rentals for the first five years of the lease and 1½% on the rentals for the balance of the term.

17. The agreement of the parties was recorded in the office of the County Recorder as a lease. [Stip. par. 3, p. 33.]

18. The lease was executed by the parties after consultation and advice of their legal counsel. [Pp. 110-111.]

19. In financing the construction of the building a deed of trust was given as security. The deed of trust was prepared by the outstanding law firm of O'Melveny, Tuller and Myers, attorneys for the trustee Security-First National Bank of Los Angeles. The deed of trust referred to the provisions of the "Oesterreich lease," and recited that Oesterreich was the owner of the real property and that a leasehold interest was created by the lease. [Ex. 7; pp. 114-115, 155.]

20. The deed of trust was executed by Oesterreich after consultation and advice of her legal counsel. [Pp. 114-115.]

21. In 1940 Oesterreich and Wilshire entered into an agreement which provided that Oesterreich was the owner and Wilshire the present lessee. The agreement provided that in consideration of Oesterreich's joining in the execution of a note secured by a deed of trust on the said real property that the lessor (Oesterreich) was to receive $7,500.00. [Ex. 8; pp. 121-122, 156-157.]

22. In 1944 Wilshire paid Oesterreich an additional $2,500.00 to secure her signature as owner of the land to refinancing papers in connection with a new loan. [P. 158.]

23. Rental payments made pursuant to the lease were paid to a bank in Los Angeles in accordance with the assignment of rents executed by Oesterreich. [Ex. 14; pp. 169-170.]

24. On several occasions Oesterreich and Wilshire executed notices of non-responsibility which recited that Oesterreich was the owner and Wilshire the lessee. [Ex. 11; pp. 160-161.]

25. The rental payments from the 68-year term of the lease will aggregate almost $700,000.00, approximately 10 to 14 times the value of the property. [Pp. 74, 166; Dep. pp. 18, 46; Ex. p. 1.]

The Court in holding that the transaction was a sale instead of a lease is rewriting an agreement entered into between parties who were represented by counsel.

The result of the Court's decision is highly artificial, because it is obvious that even if there really was "a sale" that a substantial part of each annual payment is attributable as interest. The denial of any deduction to the lessee-"purchaser" for these payments is grossly unfair. It should be noted in this connection that it now seems to be administrative policy in lease-purchase cases to recognize an interest deduction to the lessee-purchaser.

It is obvious that the rent being paid by Wilshire greatly exceeded the value of the remainder interest. The decision would be less unrealistic if it recognized that the "selling price" was only the reasonable value of the property so that the interest factor in the rents would be taxable to the lessor and deductible by the lessee.

B. There Was a Valuable Consideration for the Future Transfer of Title Other Than the Monthly Payments.

The Court in its decision overlooked the consideration which passed from the predecessor in interest of Wilshire to Oesterreich wherein Oesterreich had the use and advantage of Lot 555 and the northerly 40 feet of Lot 556, which the predecessor in interest of Wilshire purchased

and conveyed to Oesterreich so the additional land could be used for the construction of the theatre building.

The two lots which were purchased by Wilshire's predecessor were required and necessary to build a building large enough to accommodate a motion picture theatre of the size which was constructed. By so doing, additional rental for the theatre was obtained, which enabled the lessee of the Oestereich property to pay a larger ground rental to Oesterreich. Accordingly, Oesterreich received a substantial benefit in return for which she was deeding the property at the end of 68 years.

The two lots purchased and conveyed to Oesterreich in 1929 cost the predecessor in interest of Wilshire $19,650.00. [Stip. par. 4, p. 34.]

The three lots owned by Oesterreich cost her $24,235.05. [Pp. 32-33.]

The Court in its decision also overlooked the consideration which passed from the predecessor in interest of Wilshire to Oesterreich wherein the payments originally contemplated to increase from $7,500.00 a year to $12,000.00 a year progressively, and then to remain at $12,000.00 a year at the end of fifty years until the termination of the lease 18 years thereafter, were changed so that Oesterreich received $12,000.00 a year for the 11th to 28th years, and the payments diminished progressively from $12,000.00 a year to $7,500.00 a year from the 29th to the 68th year. This gave Oesterreich the advantage of additional funds during an earlier period of the lease.

The Court in its decision assumes that the transaction between Wilshire and Oestrerreich was a sale simply because Wilshire acquires title on the payment of $10.00 at

the end of 68 years. The real consideration, however, is not $10.00, but the use of the two lots which Oesterreich received as well as the use of larger early payments which were to be made at an earlier period during the lease, as set forth hereinabove.

It should be kept in mind that this is a single purpose building with the main tenant a motion picture exhibitor. What the future holds for the motion picture exhibiting business in 1997 is open to conjecture.

Whether the building in 1997 would be razed because of its unsuitability at that time is something that cannot be determined now except to say that motion picture theatre buildings ordinarily are not expected to be of value 68 years after their construction.

The Court in its decision has assumed that the land will become more valuable, but there was no evidence to show that the land would be more valuable in 1997 than at present. With the changing trends of migrations of peoples, businesses and industry, one cannot predict whether the land in question will be more valuable in 1997 than it is at present. Many areas in and about Los Angeles were thought to be on the upward trend in value, but subsequent events proved that they retrogressed instead.

The Court in its decision erred when it stated that the agreement provided for a tapering off of rental payments in later years because that was what the lessees could afford to pay. The record is silent as to what the lessees could afford to pay at the end of 28 years. The payments were reversed simply because Oesterreich wanted to get the bulk of the income as early as possible. [P. 154; Dep. pp. 24, 27, 50, 64.]

When the Court stated that the property will be worth perhaps ten times as much in 1997 as it was in 1946, it has endeavored to look into the future and foretell an event for which no evidence was submitted as to what the property would be worth in 1997.

Here again it should be kept in mind that this is a single purpose building.

According to Table 4, page 1089, Handbook of Financial Mathematics by Justice H. Moore of the Irving Trust Company published in 1944 by Prentice-Hall, Inc. (third printing), the following table sets forth the value of the reversions in 1929, assuming various fair market values of the three lots in 1929:

Value of Land in 1929	Value of Reversion in 1929
$24,235.05	$129.31
50,000.00	266.78
75,000.00	400.17

It will be seen that Oesterreich gave up very little when she agreed to sell her reversionary interest presumably for $10.00. On the other hand, what she received was very substantial; she received the benefit of two lots which cost $19,650.00; she received the benefit of $12,000.00 a year rent after the first ten years, instead of having to wait 40 years for the rent to reach that figure.

In the event Wilshire defaults in any of the monthly payments to Oesterreich it not only could be dispossessed of the property, but Oesterreich would be entitled to keep title to the two lots which had been conveyed to Oesterreich by Wilshire's predecessor in interest.

It is far more realistic to say that the consideration for the transfer of title to the property at the end of 68 years was the use by Oesterreich of the two lots, with the

possibility that she would be entitled to retain title thereto, and the shifting of rental payments during the course of the lease hereinabove mentioned, than it is to say that Wilshire was paying almost $700,000.00 for a piece of property which was never considered to be worth more than $75,000.00 at the time the agreement was signed.

C. Wilshire Holding Corporation Has Not Acquired an Equity in the Property.

The Court in its decision ignores the fact that Wilshire to this date has not acquired an equity in the property, as the amount still owing under the contract is far in excess of the appraised value of the land. The land at the time of the hearing only had a value of $100,000.00. [P. 74.] Therefore, no equity has been acquired.

When the unpaid balance under the contract has diminished to a point where it no longer exceeds the appraised value of the land, then that will be ample time to determine the question of whether Wilshire is acquiring an equity in the property. Until that point is reached, it is purely a payment of rent.

While it is true that the price of a piece of property on a deferred payment plan may be greater than a cash sale price, nevertheless the difference between the amount agreed to be paid under the contract and the appraised value of the land must not be so great and so disproportionate as in the present case.

The findings of the Tax Court are that the three lots were worth not more than $50,000.00 in 1929, and not more than $100,000.00 in 1946. [P. 178.] These findings are supported by the testimony of W. Frank Moulton, the real estate agent, that the property was worth $50,000.00 [Dep. pp. 18, 46], and by the testimony of Albert

Jack Chotiner that it was worth between $50,000.00 and $75,000.00. [P. 166.]

It is beyond reasonable comprehension that $679,000.00 would be paid for a piece of property that was appraised at only $50,000.00 in 1929.

D. The Payments by Wilshire Holding Corporation Are Commensurate With the Benefits Derived by It.

The Court in its decision erred when it stated that the schedule of payments was not commensurate to the benefit derived by Wilshire from the occupancy and use of the land. The Court overlooked the fact that at an appraised value of $50,000.00 as shown by the testimony, the yield for the first 10 years was 15% per annum; the yield for the next 18 years was 24% per annum; and the yield thereafter decreased from 24% to 15% per annum.

Surely that was a fair return to the lessor, and an expense commensurate with the benefit derived by Wilshire.

Accordingly, it is respectfully urged that on a rehearing the above entitled Court should set aside its decision summarily reversing the Tax Court, and should instead either set the matter on the calendar for hearing, granting the parties the right to file briefs on the merits in accordance with the rules of the Court, or the above entitled Court should affirm the decision of the Tax Court in the *Wilshire* case, relying on the decision of the Tax Court, the brief of the Attorney General in the *Oesterreich* case, the brief of Wilshire Holding Corporation as *amicus curiae* in the *Oesterreich* case, and the points and authorities cited herein.

Request for Hearing En Banc.

Because of the importance of the decision to be reached in this case and the fact that there is an apparent conflict in the decisions of various Circuit Courts of the United States in similar cases to the within action, it is respectfully requested and suggested that this case be heard *en banc*.

Dated: January 2, 1957.

Respectfully submitted,

MURRAY M. CHOTINER,

RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Wilshire Holding Corporation.

Certificate of Counsel.

Murray M. Chotiner, one of counsel for Wilshire Holding Corporation, does hereby certify that in his judgment the Petition for Rehearing is well founded and is not interposed for delay.

MURRAY M. CHOTINER.

Certificate of Service.

I hereby certify that three copies of the foregoing Petition were on January 2, 1957 mailed to the attorney for the Commissioner of Internal Revenue, addressed as follows:

"Herbert Brownell, Jr., Attorney General,
Department of Justice, Washington, D.C.",

and that three copies were mailed on January 2, 1957 to the attorney for Walburga Oesterreich addressed as follows:

"Charles I. Rosin, Attorney at Law,
408 South Spring Street, Los Angeles, California."

MURRAY M. CHOTINER,

Murray M. Chotiner of Counsel for Wilshire Holding Corporation.